

Matter of Sunter v David
2009 NY Slip Op 30316(U)
February 6, 2009
Supreme Court, New York County
Docket Number: 407023/07
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

Part 16

PRESENT: ALICE SCHLESINGER
SCHLESINGER
Justice

PART 16

MAZE SUTER
- v -

DAVID

INDEX NO. 407023/07
MOTION DATE _____
MOTION SEQ. NO. 2
MOTION CAL. NO. _____

UNFILED JUDGMENT

The following papers, numbered 1 to _____

This judgment has not been entered by the County Clerk and notice of entry cannot be served on any person. To obtain entry, counsel or other representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion

for reargument are determined in accordance with the accompanying memorandum decision.

Dated: February 6, 2009
FEB 06 2009

Alice Schlesinger
ALICE SCHLESINGER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
In the Matter of the Application of

MALE SUNTER,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

-against-

JONATHAN DAVID, Records Access Appeals Officer for the New York City Police Department, and PATRICIA J. BAILEY, FOIL Appeal Officer for the New York County District Attorney's Office,

Respondents.

-----X
SCHLESINGER, J.:

On July 17, 2008, this Court decided in part petitioner's Article 78 challenge to determinations by the New York City Police Department (NYPD or the Department) and the New York County District Attorney's Office (DA) denying his request for documents pursuant to the Freedom of Information Law (FOIL). The NYPD had cross-moved to dismiss. I denied this request and instructed the Department to serve a Verified Answer on petitioner. However, I granted the DA's application for the same relief expressed in its Answer.

The basis for granting the DA's motion was twofold: untimeliness of the challenge(s) (petitioner's administrative appeal had to be commenced within 30 days of the initial denial and his Article 78 within 4 months of the final determination, but both were commenced far in excess of these time limits) and the respondent's inability to locate the documents.¹

¹It should be noted that in the DA's initial denial of Mr. Sunter's request of January 31, 2007, it relied in part on Public Officers Law §87 subd.2(e)(i) or that the documents

UNFILED JUDGMENT
This judgment has been filed with the County Clerk and notice of entry cannot be given hereon. To obtain this judgment, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).
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Motion Seq. Nos. 001 & 002

With regard to the cross-motion by the NYPD, I found that the challenge was not untimely as I computed the four-month statute of limitations from the date when petitioner Mr. Sunter had received notice of the denial, July 30, 2007, as opposed to the date it was issued, July 25, 2007.

On the merits, the Department had relied on two exemptions, one that the disclosure of the documents would interfere with the pending criminal appeal and second that, pursuant to CPL §160.50, the criminal records had been sealed because the action had been determined in favor of the accused. As to the sealing exemption, since Mr. Sunter had been convicted of the charges after a jury trial and no explanation had been given for this reliance, I indicated my confusion as to why this provision had been cited. As to the judicial interference exemption, I declined to consider the Department's reliance on it because it had never before cited that as a reason for denial of the original FOIL application or the administrative appeal. I therefore found that it was unpreserved.

Now I have two motions to reargue these decisions, one from the Police Department regarding the denial of its motion to dismiss and one from Mr. Sunter as to my dismissal of the Article 78 vis-a-vis the District Attorney. NYPD has also filed an Answer to the petition pursuant to my prior order.

I will first deal with petitioner's motion. That is denied. I do not see that this Court misapprehended or misapplied the law in deciding that Mr. Sunter's challenge was untimely and/or that the DA could not be compelled to produce documents it could not find.

were exempt from disclosure because such "would interfere with judicial proceedings", i.e., petitioner's pending appeal of his criminal conviction. This Court did not reach that issue because petitioner's claims were found to be time-barred.

The Department, in its motion, takes issue with many aspects of my decision. First, on the timeliness of Mr. Sunter's Article 78 challenge, it makes the hyper-technical argument that since petitioner's challenge was in the nature of mandamus, "mandamus to compel," as in a mere ministerial act, as opposed to mandamus to review or even certiorari, then the four-month statute of limitations begins to run from the date of the decision, not the date it was received by the petitioner.

Counsel argues that the Department's decision involves pure statutory reading and application and requires no interpretation nor special expertise of the police. Therefore, it contends that all that a court does is review the actual decision when it is made, as opposed to when the individual aggrieved by that decision becomes aware of it.

I am denying reargument on this point. First, it should be noted that no cases are cited which stand for this proposition, i.e., that not only is this in the nature of "mandamus to compel" but further that it requires no judgment or discretion by the Department in applying the exemption, and finally, that it then results in a shortening of the four-month period, as it would here by 5 days.

As this Court cited to in its decision, "fundamental fairness would seem to compel the conclusion that a petitioner should not be held to have been dilatory in challenging a determination of which he was not aware." *Biondo v. New York State Board of Parole*, 60 NY2d 832 (1983).

I find that the distinction argued here, while undoubtedly fascinating to a law school class, particularly one taught by Professor David Siegel as to the less than clear-cut

distinctions between the various Writs,² does not govern the Article 78 here brought by a prisoner seeking access to public records. Such a proceeding should instead be governed by rules of reason and fairness, as this Court did in its original holding. The Department does interpret a statute in adjudicating a FOIL request, and in doing so, it makes decisions as to whether certain exemptions apply and explains its reasoning. Following that, a court can then review the propriety of the decisions. Therefore, I find that while this challenge contains aspects of mandamus (to review and compel), it also involves certiorari, i.e., “whether the denial was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion” (CPLR §7803, subd. 3), and not simply the mandamus test as to “whether the body or officer failed to perform a duty enjoined upon it by law” (§7803, subd. 1).

As to the other proffered reason for reargument, counsel takes issue with this Court’s earlier refusal to entertain all of its later claimed exemptions as not having been properly preserved. Here, the Department cites to *Gould v. New York City Police Department*, 89 NY2d 267 (1996), wherein the Court of Appeals, after first deciding that the lower courts were in error in allowing the Department to assert a blanket exemption from FOIL disclosure of certain police documents and mandating instead a particularized showing of any claimed exemption (at p. 275), did remand the cases to Supreme Court so that the Police Department would have an opportunity to make a particularized showing that “a statutory exemption applies to justify nondisclosure of the requested documents” (p. 273).

²Please see Siegel, D., *New York Practice*, §557ff (Fourth Ed. 2005).

But *Gould* does not address exemptions not relied upon in the first instance. Rather, remittal was ordered solely to give the Department a chance to proffer an individual, rather than blanket, exemption for each category of document.

Here, the only two exemptions actually asserted in the original denial were the CPL §160.50 one and the assertion that the documents were in the possession of another agency. The latter exemption is now asserted in the Answer. As to the §160.50 exemption, an explanation is, for the first time, offered. It is that the sealing, pursuant to a favorable determination, applies to Mr. Sunter's co-defendant in the criminal proceeding. Additionally, counsel again attempts to rely on the newly-stated exemption based on petitioner's pending criminal appeal and argues that this FOIL request interferes with that. However, no particulars are given as to how such interference would manifest itself.

This Court is cognizant of the cases cited in that regard, such as *Sideri v. Office of the District Attorney*, 243 AD2d 423 (1st Dept 1997) and *Moreno v. New York County's District Attorney's Office*, 38 AD3d 358 (1st Dept 2007). But both of these cases involve parties to the appeal, the Office of the District Attorney, not the Police Department, which has no involvement at all in Mr. Sunter's appeal. As it is a direct appeal, of course, the parties are limited to the record made in the criminal proceedings.

Further, despite the language in *Legal Aid Society v. New York City Police Dept*, 274 AD2d 207 (1st Dept 2000), suggesting that a particularized explanation is not necessary, despite *Gould*, the petitioners in the appeals still had active cases in the criminal court. Thus, the Department arguably would have a legitimate argument in not wanting to interfere in those pending prosecutions. *Legal Aid Society (supra)* had nothing to do with appeals.

Finally, as mentioned before, this newly relied-upon exemption was not originally mentioned or given by the Department in any of its denials of petitioner's requests.

Therefore, I am granting reargument solely as to the claimed §160.50 exemption, as it ought to be considered. Here, as Mr. Sunter points out, he is only requesting documents that apply to him, not his co-defendant. Therefore, the Department should not have to violate §160.50 in dealing with his request. To the extent his co-defendant is mentioned in some of those documents, his (her) name and identifying information can be redacted.

In the Department's Verified Answer, a multitude of exemptions are cited, including the fact that a diligent search for some records has been unsuccessful [POL §89(3)]. To the extent that such has been documented, and it has, in an affidavit prepared by Sergeant James Russo on September 25, 2008, those specified documents (his paragraph "8"), as well as other documents not in the Department's custody (see paragraphs 6 & 7) do not have to be turned over.

As to the other exemptions, it should be noted at the outset that these exemptions were never relied upon before in denying petitioner's FOIL request. Be that as it may, the now cited exemptions declared for the first time in the Answer rely on various subsections of POL §87(2)(e). They allege in conclusory terms that disclosure "would constitute an unwarranted invasion of privacy to the victim, the victim's family, the witness involved, and Petitioner's co-defendant" (Third Defense); that disclosure would endanger the life or safety of the victim, the family, witnesses, etc. (Fourth Defense); that such disclosure would reveal confidential information (Sixth Defense); and that the documents are compiled for law enforcement purposes and would reveal non-routine criminal investigative techniques and procedures (Fifth Defense).

Since the purpose of FOIL is to promote open government and public accountability, (See *Matter of Gould, supra*), certain principles comports with this purpose have been articulated. They are one, that agency records are presumptively open to the public (*Matter of Citizens for Alternatives to Animal Labs v. Board of Trustees of State University of N.Y.*, 92 NY2d 357); two, that disclosure may not be denied based upon the purpose for which the agency created or retains the documents (*Matter of Capital Newspapers v. Whalen*, 69 NY2d 246); three, that the one seeking disclosure does not have to set forth good cause or any cause for his request (*Gould, supra*); four, that disclosure cannot be denied based solely on the identity of the requestor (*Farbmar & Sons v. New York City Health & Hosp. Corp.*, 62 NY2d 75); five, that exemptions from disclosure are to be narrowly construed with the burden resting on the agency to justify their refusal (*Matter of Honig v. State of N.Y. Dept of Motor Vehicle*, 79 NY2d 106); and six, that blanket exemptions are not acceptable. Rather, the agency is required to set forth particularized and specific justification for denying access (*Matter of Capital Newspapers v. Burns*, 67 NY2d 562; *Gould, supra*).

Therefore, in applying these principles to the instant case, I am directing the Department to submit the requested documents to the Court for an *in camera* inspection along with a detailed, fact-specific explanation/justification for each of the itemized exemption(s). *Johnson v. NYC Police Dept*, 257 AD2d 343 (1st Dept 1999). This shall be done on or before February 27, 2009.

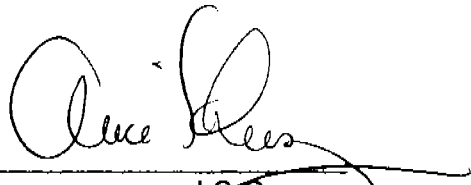
Accordingly, it is hereby

ORDERED that the motion by NYPD for reargument is granted to the extent provided herein, and the motion by petitioner for reargument is denied; and it is further

ORDERED AND ADJUDGED that the petition is granted on an interim basis to the extent provided herein, with a final determination to be made following the *in camera* inspection.

Dated: February 6, 2009

FEB 06 2009


J.S.C.
ALICE SCHLESINGER

FILED JUDGMENT
This judgment has been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 741B).